IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions of the Courts Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals, before Justices Evans, Sparks and Major, as written by Mr. Justice Sparks (R. 486, herein p. 78), is appended and is not yet reported. The opinion of the Circuit Court of Appeals in the related case of *United States* v. *Johnson* (herein p. 90) is reported in 123 F.^{2} 111.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 31, 1941 (R. 497). Petitioner filed a petition for rehearing which was denied December 4, 1941 (R. 498). The jurisdiction of this court is invoked under section 347 (a) of Title 28, United States Code. (Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925.) See also Rule XI of the Criminal Appeals Rules, promulgated by this Honorable Court on May 7, 1934 (220 U. S. 666).

The specific claims advanced and rulings made in the lower court which are relied upon as the basis of the jurisdiction of this Honorable Court, with page references to the printed record, have been respectfully set out in our petition.

Statement of the Case.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (herein p. 1).

Errors to Be Urged.

Reference is respectfully made to our petition under a similar heading (herein p. 30).

Questions Presented.

1. Was the Grand Jury legally constituted; were the jurors hand-picked?
2. Is the indictment sufficient?
3. Was petitioner afforded the right to an impartial jury?
4. Was petitioner afforded a fair trial and due process of law?
5. Was the evidence sufficient?
6. Please also see our Petition (herein p. 22).

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are copied in the appendix (herein p. 75) and are as follows:

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

U. S. C. A., Title 26, sec. 145 (b), p. 537.

U. S. C. A., Title 28, sec. 411, (Judicial Code, sec. 275).

U. S. C. A., Title 28, sec. 412, (Judicial Code, sec. 276).

Illinois Rev. Stats. (1939) c. 78, sec. 1.

Illinois Rev. Stats. (1939) c. 78, sec. 25.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

A grand jury is a creature of statute and can have only the existence authorized by statute.

In Re Mills, 135 U. S. 263, 267.
Ex Parte Farley, 40 Fed. 66, 69.
See also *Johnson* case appended (herein p. 90).
United States v. *Johnson,* 123 F.[2] 111.

II.

Except where continued as provided by law, a grand jury has no existence beyond the term for which it was impaneled.

Jones v. *United States,* 162 Fed. 417, 421.
See also *Johnson* case appended (herein p. 90).
United States v. *Johnson,* 123 F.[2] 111.

III.

The Government was required to prove the material allegation of the indictment that the grand jury had "begun but not finished during said December term of court, among other things, an investigation of the matters charged in this indictment."

United States v. *Johnson,* 123 F.[2] 111. (Appended p. 90.)

The burden is on the prosecution to prove beyond a reasonable doubt that petitioner had a taxable income over the amount returned for each of the years involved. He

could not be guilty of attempting to evade a tax unless some tax was due.

Gleckman v. *United States*, 80 Fed. (2nd) 394, 399.
O'Brien v. *United States*, 51 Fed. (2nd) 193, 196.

The mere fact that petitioner had transactions involving large sums of money would not prove that all the money handled was taxable income.

Gleckman v. *United States*, 80 Fed. (2nd) 394, 399.
Oliver v. *United States*, 54 Fed. (2nd) 48, 50.

The burden of proof in a criminal case never shifts to the defendant.

McKnight v. *United States*, 115 Fed. 972, 974.
Chaffee v. *United States*, 18 Wall. 516, 545.
Nicola v. *United States*, 72 Fed. (2nd) 780, 788.
Minner v. *United States*, 57 Fed. (2nd) 506, 512.
Melton v. *United States*, 120 Fed. 504.

IV.

The court erred in overruling the challenge to the array which brought into question the manner in which the grand juries and the trial jury were selected.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

Smith v. *Texas*, 311 U. S. 128.

Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, and it will not unduly burden the citizens of any part of it, although some unnecessary expense may be incurred.

May v. *United States*, 199 Fed. 53, 59.

It is unfair to systematically exclude people who are qualified to be jurors, resident in Cook County and Chicago.

United States v. *Standard Oil Co.*, 170 Fed. 988.

Jury lists should, so far as possible, be free from suspicion or criticism.

United States v. *Murphy*, 224 Fed. 554.
Walker v. *United States*, 93 F.[2] 383, 391.
Atwood v. *State*, 96 Tex. Cr. Rep. 249, 257 S. W. 563.
Pollard v. *State*, 148 Ga. 447, 96 S. E. 997.
Pierre v. *Louisiana*, 306 U. S. 358.
Strauder v. *West Virginia*, 100 U. S. 303, 308.
Walker v. *United States*, 93 F.[2] 383, 391.

V.

Error in testimony of Clifford. The error committed in this regard alone is sufficient to reversal.

United States v. *Johnson*, 123 F.[2] 111 (herein pp. 90, 112).

As a general rule, the testimony of a witness must be limited to the facts of which he has personal knowledge. Giving in evidence his opinion or conclusions upon matters within the scope of common knowledge or experience, or where all of the relevant facts can be introduced, it is not permitted.

Wharton's Criminal Evidence (11th Ed.), sec. 944, p. 1658.
Connecticut Mutual Life Insurance Co. v. *Lathrop*, 111 U. S. 612.
Wigmore on Evidence (Third Ed.), Vol. 2, sec. 557.
Railway Company v. *Kellogg*, 94 U. S. 469, 472.
Hunt v. *Kile*, 98 Fed. 49, 53.
Insurance Company v. *Muhlman Co.*, 91 Fed. 85, 88.

Lumber Company v. *W. & B. L. & L. Co.*, 255 Fed. 645, 646.
Branan v. *Wimsatt*, 298 Fed. 833, 835.
Lisansky v. *United States*, 31 F.[2] 846, 851.

Even if the prosecutor had a right to examine his expert along the line indicated, he should have assumed a hypothetical person and stated his assumed facts in such a way as to leave it to the jury to determine whether the hypothetical person was this defendant, and allow the jury to decide if the facts assumed had been proven.

Rogers on Expert Testimony (1891), Chap. 1, sec. 28.

The law does not look with favor upon opinion evidence and the practice of receiving opinions has been subjected to considerable criticism. The law can not be relaxed to such an extent as to predicate one opinion on another.

22 Corpus Juris, Evidence, Sec. 594.
McAnany v. *Henrici*, 238 Mo. 103, 141 S. W. 633.
Cardinale v. *Kemp*, 309 Mo. 241, 274 S. W. 437, 447.
20 American Jurisprudence, p. 661, sec. 787.

An expert may not be asked his opinion based upon the testimony of witnesses not heard by him especially where it appears that he has not even read part of the testimony.

Nichols on Applied Evidence, Vol. 2, p. 2070, sec. 47.

It is error to call upon an expert witness to interpret the meaning of statements made by others.

Nichols Applied Evidence, Vol. 2, p. 2074, sec. 69.
22 Corpus Juris, Evidence, sec. 603.
McCray v. *State*, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101.
Edwards v. *State*, 181 S. W. 195.
United States v. *Stephens*, 73 F.[2] 695.

Witnesses should not be permitted to state their views on matters of legal or moral obligations.

Greenleaf on Evidence (Lewis Ed. 1896), Vol. 1, sec. 441.

Jones Commentaries on Evidence (2nd Ed.), Vol. III, sec. 1336.

Federal courts are bound by the rules enforced in the State courts in the matter of the examination of experts.

Peters v. *Mutual Life*, 107 F.[2] 29.

It is not the proper practice to ask of a witness called as an expert, a question which does not embody a hypothetical statement of the facts, but which directly calls upon the witness to put himself in the place of the jury, and, in view of the evidence submitted, pass upon the whole issue.

Pyle v. *Pyle*, 158 Ill. 289, 299.

An expert witness should not be permitted to invade the province of the jury.

People v. *Rongetti*, 338 Ill. 56.

A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege of the party against whom he is called, and a denial of this right is prejudicial and fatal error.

Heard v. *United States*, 255 Fed. 829, 832.

Jones Commentaries on Evidence (2nd Ed.), p. 4565.

23 Corpus Juris, sec. 881, p. 103.

70 Corpus Juris, sec. 807, p. 638.

Meyer v. *United States*, 220 F. 822.

Collins v. *State*, 111 S. E. 733, 153 Ga. 95.

70 Corpus Juris, sec. 809, p. 641.

United Verde Extension Mining Co. v. *Ralston*, 37 Ariz. 554, 296 P. 262.

Thompson on Trials, sec. 405, p. 367, (2d Edit. 1912), sec. 406, p. 420.
Curry v. *State*, 162 S. W. 851, 72 Tex. Cr. 463.

Where a conviction is sought upon circumstantial evidence alone, the Government must not only show that the alleged circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the defendant. The court erred in refusing to so instruct the jury.

Anderson v. *United States*, 30 F.[2] 485, 487.
Marzen v. *People*, 173 Ill. 43, 50 N. E. 249.

The court erred in instructing the jury to the effect that evidence that the defendant did not file a tax return for prior years may be considered as an admission by him that the defendant did not have a net income sufficient to require a tax return.

When a rebuttable presumption presenting no inherent probative force is met by opposing evidence, the presumption is entirely destroyed and ceases to be a factor in the trial.

State v. *Brown*, 36 Utah 46, 102 Pac. 641.
Graves v. *Colwell*, 90 Ill. 612.
Reynolds v. *State*, 58 Neb. 49, 78 N. W. Rep. 483, 11 Am. Cr. Rep. 159.
State v. *Meyer*, 58 Vt. 457, 7 Am. Cr. Rep. 428.
Van Gorder v. *United States*, 21 F.[2] 939.
Sherman v. *United States*, 268 Fed. 516.
Tomplain v. *United States*, 42 F.[2] 205.

It is well established that the basis of a presumption must be a fact, and that one presumption cannot be a basis of another presumption.

Wagner v. *United States*, 8 F.[2] 581, 586.
Johnson v. *United States*, 146 Fed. 121.

Where a statement testified to in chief admits of two inferences, it is the proper function of cross-examination to eliminate the inference which is unfavorable to the defendant. This rule demonstrates the error in restricting the cross-examination of Raber.

Meyer v. *United States*, 220 F. 882.
United Verde Extension Mining Co. v. *Ralston*, 37 Ariz. 554, 296 P. 262.

When the defendant took the stand as a witness in his own behalf the prosecutor launched a smear campaign under the guise of cross-examination. That kind of cross-examination is error.

Little v. *United States*, 93 F.[2] 401, 408.
Lennon v. *United States*, 20 F.[2] 490, 494.
Glover v. *United States*, 147 Fed. 426.
Havener v. *United States*, 15 F.[2] 503.
Gideon v. *United States*, 52 F.[2] 427.
Hartzell v. *United States*, 72 F.[2] 569.
Salerno v. *United States*, 61 F.[2] 419, 424.
Allen v. *United States*, 115 F. 3, 11.
Gideon v. *United States*, 52 F.[2] 427.

The United States is not concerned in the enforcement of local laws regulating or prohibiting gambling in Cook County.

Willingham v. *United States*, 208 Fed. 137.

A new trial should be awarded where it appears that the prosecuting attorney has overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.

Berger v. *United States*, 295 U. S. 78.
United States v. *Perlstein*, 120 F.[2] 276 (283).
Beck v. *United States*, 33 F.[2] 107.
Nations v. *United States*, 32 F.[2] 598.

The indictment is fatally defective.

The indictment should set forth the facts so distinctly and so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

Fontana v. *United States*, 262 Fed. 283.
Lynch v. *United States*, 10 F.^{2} 947.
Jarl v. *United States*, 19 F.^{2} 891.
Partson v. *United States*, 20 F.^{2} 127.
United States v. *Wallace*, 35 F.^{2} 552.
Skelley v. *United States*, 37 F.^{2} 503.
White v. *United States*, 67 F.^{2} 71.

Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.

United States v. *Hess*, 124 U. S. 483.

It is fundamental that where a crime can only be committed by a particular class, the indictment should show on its face that the defendant belonged to that class by direct averment, not as a mere conclusion of law.

Johnson v. *United States*, 294 F. 753.
Anderson v. *United States*, 11 F.^{2} 938.
Kutler v. *United States*, 79 F.^{2} 440, 442.

The indictment is defective for uncertainty for the reason that material portions are laid under a videlicet.

Rose v. *Mutual Life Insurance Co.*, 144 Ill. App. 438.
19 Enc., Pleading and Practice, sec. 215, 253.

Gould's Pleading and Practice, Chap. 3, pp. 72, 77.

Bishop's New Criminal Proceedings, sec. 406, p. 252.

1 Greenleaf on Evidence, sec. 60, in appendix of second edition.

Chitty's Pleading, 317, 318.

Starkies Criminal Pleading, 277, 278.

Clark's Criminal Procedure, 173, 174.

31 Corpus Juris Indictments and Informations, sec. 184.

Stukeley v. *Butler,* Reports of Sir Henry Hobart (p. 300, 302, margin 168, 169).

If the portions of the indictment under videlicet are to be held to be material that must be proved as laid and a fatal variance exists.

Brown v. *Berry,* 47 Ill. 175.

Gleason v. *M'Vickar,* 7 Cowen's Rep. (N. Y.) 41.

Skinner v. *Andrews,* 1 Saund. 170.

Derragon v. *Rutland,* 58 Vt. 128, 135, 3 Atlantic 332.

State v. *Grimes,* 50 Minn. 123, 52 N. W. 275.

Anderson v. *United States,* 30 F.[2] 485.

Clark v. *Employers Liability Assurance Co.,* 72 Vt. 458, 48 A. 639, 642.

Frank v. *Morris,* 57 Ill. 138.

State v. *Scovill* (Mo. App.), 15 S. W.[2] 931, 935.

Kutler v. *United States,* 79 F.[2] 440.

Naftzger v. *United States,* 200 F. 494.

Anderson v. *United States,* 30 F.[2] 485.

United States v. *Burnham,* 1 Mason's Cir. Court Rep. 57.

The court erred in refusing a bill of particulars.

Singer v. *United States*, 58 F.[2] 74.
United States v. *Empire State Paper Co.*, 8 Fed. Supp. 220, 221.
United States v. *Farrington*, 11 Fed. Supp. 214.
Wong Tai v. *United States*, 273 U. S. 77.

The indictment alleges two distinct offenses and is therefore duplicitous.

Bratton v. United States, 73 F.[2] 795, 797.
Creel v. *United States*, 21 F.[2] 690.
Evans v. *United States*, 153 U. S. 584, 587.
Rumley v. *United States*, 293 F. 532.

Neither verdict can be sustained, as the law does not sanction piecemeal verdicts.

Jurors should not be permitted to return piecemeal verdicts; all their conclusions must be comprehended in a single verdict.

Commonwealth v. *Parker*, 294 Pa. 144, 143 A. 904, 907.
United States v. *Watkins*, Fed. Cas. 16649, 28 Fed. Cas. p. 419, 478 (3 Cranc. C. C. 441).

The error which brought about the situation in the case at bar is harmful, and there is no cure for it but the grant of a new trial.

Owens v. *State*, 40 Ga. A. 508, 150 S. E. 455.

ARGUMENT

Grand Jury Illegal.

It must be remembered that all petitioner requested was a hearing upon this charge that the investigation against him had not started at the regular term of the grand jury. Surely, the recitation made by the grand jury in the inducement was not conclusive. If the orders of court extending the grand jury be examined, it will be seen that in the light of the *Johnson* opinion they are susceptible to the construction that the jury was illegally authorized to return indictments in which the investigation began in February.

Upon first blush one might think a distinction should be made because the indictment in the case at bar was returned in the February Term and that in the *Johnson* case was returned in the March Term. But both were returned after the illegal order authorizing the jury to continue investigating matters commenced in February. If in fact the investigation against your petitioner had commenced in February, it matters not when the indictment was returned or what was said in any order; the grand jury had no power to act. The fact as to when the grand jury commenced its investigation was easily ascertainable in a short time. We respectfully submit that your petitioner could have made no more positive allegation than that which he made under oath (R. 32):

> "(4) There was no evidence had or taken or submitted to the alleged December A. D. 1939 term grand jury touching the subject matter of this indictment."

Your Honors will perceive from the *Johnson* record which is before this Honorable Court (Docket Nos. 799 and 800) that the same allegation was made by all the defendants, including your petitioner, in the *Johnson* case. It is

difficult to understand why petitioner was not afforded a hearing in the trial court, and the difficulty becomes greater when it is observed that upon the identical facts one group of defendants (in the *Johnson* case) was afforded relief in the Circuit Court of Appeals and your petitioner was denied relief.

When petitioner charged that the grand juries returning indictments against him had been hand-picked, it would seem that ordinary justice demanded a hearing. There can be no suggestion that petitioner was out of order or unduly attempting to delay the trial. The record shows that any complaint your petitioner had to make by way of plea in abatement was foreclosed by the striking of his pleas. When your petitioner charged in his motion to quash that the grand jury was hand-picked, the trial judge announced that he did not care to hear anything on that charge (R. 82).

The Challenge to the Array.

The only conclusion your Honors can reach from this record, we respectfully submit, is that the reason your petitioner was denied a hearing was that the prosecutor knew the charges to be true. The cases we have cited show that similar charges have been made over a period of years. It is a fair inference from all of this to say that it is common knowledge that a defendant cannot secure a fair trial before a jury in the Federal court in Chicago. The system has worked to the advantage of the prosecutor so long that he is loath to surrender it. The trial judge passed the responsibility to the Circuit Court of Appeals. There, as your Honors perceive, the question was evaded. The attempted evasion follows the pattern of *Carter* v. *Texas*, 177 U. S. 442, 447, and other cases cited in our petition (herein p. 24, II).

The drawing of jurors is governed by Statute and custom (U. S. C. Title 28, sec. 411, Judicial Code sec. 275, U. S. C. Title 28, sec. 412, Judicial Code sec. 276, Ill. Rev.

Stats. (1939) c. 78, sec. 1). We are not standing upon any technical point. As was said in *Pointer* v. *United States*, 151 U. S. 396, 407:

> "* * * the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offences."

All your petitioner sought was an impartial jury. The charge made by your petitioner was more than an imputation. In *United States* v. *Chaires*, 40 Fed. Rep. 820, 823, it was held that even a defective plea should put the court on inquiry.

We respectfully submit that our position in the case at bar is founded on stronger ground than that of the defendant in *Neal* v. *Delaware*, 103 U. S. 370, where the state officials, without success, endeavored to evade the real issue upon procedural technicalities. It was held (390) that the trial court was bound to redress the wrong which was a violation of the constitution:

> "As was said by us in *Virginia* v. *Rives, supra* (100 U. S. 313) 'The court will correct the wrong, will quash the indictment, or the panel, or if not, the error will be corrected in a Superior Court' and ultimately in this court upon review."

Judge Sullivan, the trial judge, in the case at bar said (R. 88):

"I don't think it is my duty."

Your petitioner charged (R. 55), among other things, that those outside of Chicago were favored and an effort was deliberately made by those in charge to obtain jurors calculated to be unfavorable to your petitioner by choosing executives and suburbanites. That those in charge unlawfully, intentionally and systematically excluded qualified voters from among the persons summoned and listed for

jury service on both grand and petit juries solely because those excluded might, by reason of their place of residence, occupation and station in life, be open and fair minded concerning the rights of defendants, and that those in charge unlawfully discriminated in favor of prospective jurors who might favor the cause of the prosecution. Your petitioner set up the manner in which he feared prejudice. That a feud existed between the State's Attorney and the city authorities, resulting in ax raids. That in order to discredit the city administration your petitioner was named in the newspapers as one who collected and paid bribes. That these charges had been repeated deliberately in the newspapers on the eve of this trial in order to prejudice your petitioner in his right to a fair jury. Your petitioner charged that persons drawn from Chicago in the ordinary walks of life would be more apt than those of the class usually selected for services in the Federal Court to understand the methods employed by the newspapers, and would know that many false charges are so made for political purposes. Your petitioner said that he feared that gambling would be made an issue and that he could not secure a fair trial before a jury so chosen. Your petitioner caused a search to be made of the records, showing jurors drawn from the past five years, and demonstrated to the court that although the population of the City of Chicago and County of Cook comprised 85% of the District, the jurors were chosen from the country and suburbs to the extent of 85%. Your petitioner represented to the trial court that he feared that the same disproportion would appear in the special venire. The list of jurors was given your petitioner just before trial and, as shown by the record, the discrimination feared by your petitioner was shown by the list. As appeared from the jury list (R. 90), only four of the fifty were from Chicago, Chapman, Schmettzer, Tesch and Weiner. The court excused Schmettzer and Chapman, and Weiner was not found. This left but one,

Tesch, from Chicago, on the special venire. This juror lived so near the county line he might be classified as a suburbanite. Tesch served on the jury (R. 94).

We respectfully request a careful study of the affidavits of Mr. C. A. Caplow (a member of the Bar in Chicago), who reported the manner in which he searched the records in order to reflect, as near as possible, the condition which existed for the past two years. Your Honors will see that this search was painstaking and exhaustive, including (R. 58) the files and records of the Clerk of the trial court, the United States Jury Commissioner's office, of the Jury Commissioner of Cook County, Illinois, of the official census reports, of the Cook County Election Commissioner, of the Chicago Board of Election, of the County Clerk of Cook County, Illinois. Mr. Caplow describes the method employed and the custom, which is to address written requests to the several postmasters, women's organizations, church groups and other kindred private organizations, for the names of citizens in their political district or within their social sphere who might qualify as jurors. (Please also see the *Glasser* case.) The questionnaires were sent to the individuals thus recommended; then from the answers jurors were selected. It was represented to the trial court that your petitioner or anyone connected with gambling or Chicago politics had no chance to secure the presumption of innocence at the hands of a body so selected.

Mr. Caplow in his affidavit presented to the trial court a table (R. 59) showing the population of the various counties in the District in numbers as well as in percentage, from which table it will be seen that Cook County has 85% of the population. It will be seen that Chicago has 83% of the population of Cook County (R. 69).

As your Honors will perceive, the affidavit shows the number of persons drawn for grand jury service and for petit jury service during 1939 and 1940, with a table show-

ing their distribution as to counties. The affidavit shows a calculation of the distribution which any defendant had a right to expect if the drawing had been by lot or fairly conducted in some manner which would bring about a fair representation according to population as to qualified voters and jurors. This showing of the record is carried into the grand juries returning these indictments, and the same unfair distribution is shown by the record to have applied to a number of cases recently tried in the District Court. Then the record shows that the same discrimination existed as to the special venire called to try the case at bar. As Mr. Justice Black said in *Pierre* v. *Louisiana*, 306 U. S. 354, if the prosecutors or authorities had had any contradictory evidence as to these conditions which are reflected by the records, they would have produced it. Mr. Ryan, representing the Government in the case at bar, said that (R. 82):

> "the Government takes the position that the challenge to the array here shows on its face, together with the affidavit filed in connection with it, that it is not entitled, that it is not sufficient in law to entitle the defendant to quash the panel in this case."

It appears that names were drawn by lot from the lists so selected (R. 59). But as in the *Pierre* case, there is no chance for a fair drawing by lot from a hand-picked list.

Mr. Ryan said in the case at bar (R. 83):

> "These statistics were submitted upon the theory that the law requires there be an apportionment of the members of a panel from the various parts of the district in accordance with their population, and in that connection I would like to discuss the cases."

Your Honors will see that Mr. Ryan admitted that the statistics were correct, but Mr. Ryan misconceived our position. If we had merely shown that only one juror out of fifty drawn for the trial was from Chicago that may have been an accident. It may have been accidental that the two

grand juries were drawn largely from the country (R. 74). But when we charge that these juries were drawn pursuant to an illegal custom which has been practiced for years, and when we submitted figures to support our claim, it can not be said that we complained merely because the jurors happened to have been drawn from the outlying districts.

Your Honors will notice that the prospective jurors were examined by the court as to their qualifications, including suggestions by the parties (R. 94). The trial judge forced the defendant to trial with the hand-picked panel. Your petitioner exhausted his peremptory challenges and then renewed his objections to the panel in the form of a challenge for cause after his peremptories were exhausted (R. 94). So your Honors will see that your petitioner did everything in his power in his effort to secure a fair trial jury.

As to the grand juries the court refused to hear the matter at all, as appears from the following (R. 82):

> "The Court: Is that all?
> "Mr. Stewart: That is all, your Honor.
> "The Court: I don't care to hear from you—
> "Mr. Ryan: You don't want to hear—
> "The Court: I say, I don't care to hear from you on this first point.
> "Mr. Ryan: No, sir.
> "The Court: I mean as to the indictment not being sufficient. I would like to hear from you concerning this jury."

The trial judge has certified all that was said by the Government attorneys on this subject (R. 80 to 90), from which your Honors will see that the Government attorneys demurred to our charge. The language used by Mr. Ryan is quite significant. We quote (R. 87):

> "And the Government moves that this challenge be summarily overruled, your Honor, and that the prosecution be permitted to proceed in the usual manner."

This was said, as your Honors perceive, by the Government attorneys after we charged that the usual manner consists in packing the jury against a defendant.

In *In Re Petition for Special Grand Jury*, 50 F.^{2} 973, it was said:

> "This petition suggests the selection of the special grand jury by certain citizens and certain organizations of Luzerne County. Such method of selection is not permitted by the laws of the United States. The law requires that the selection of names to go into the jury box be made by the Commissioner of jurors and by the Clerk of the court. Section 412, United States Code Annotated, title 28. No other person or official has the right to participate in such selection. *United States* v. *Murphy* (D. C.), 224 F. 554.
>
> "The petition further suggests that the special grand jury be selected from Luzerne County. While a grand jury may be selected from a particular section of the district, such method of selection should not be employed unless found necessary; such method has never been used in this district, and it might result in a prejudiced grand jury, and an unfair investigation and create an unwise precedent."

As was said in *Smith* v. *Texas*, 311 U. S. 128, 85 L. Ed. 106, 108:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

There was no order in the case at bar to select the jury from any particular part of the district. As was said in *United States* v. *Coit*, Fed. Cas. No. 14,829:

> "it was completely in the power of the marshal to return at any time just such a jury as would answer the purposes of the Government, or any of the officers of the Government having an interest in the cause to be tried."

The panel was quashed, also quashed in *State* v. *Austin,* 183 Mo. 478, 82 S. W. 5. In *May* v. *United States,* 199 Fed. 53, 59, it was held:

> "Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, and it will not unduly burden the citizens of any part of it, although some unnecessary expense may be incurred."

We shall briefly notice the authorities cited to the trial court (as shown by the record) by Mr. Ryan on behalf of the Government in the case at bar. But first permit us to respectfully refer to a case on all fours with the one at bar.

United States v. *Standard Oil Co.,* 170 Fed. 988.

In the above case Judge Anderson, in 1909, allowed a challenge to the array of jurors on the ground that while the City of Chicago had more than two-thirds of the total population of the Northern District of Illinois from which the jury was drawn, only 3 out of 150 jurors in the panel resided in Cook County, and that 6 per cent of the jurors drawn were farmers or retired farmers. We respectfully refer your Honors to all that was said upon the subject, as appears from the report, and quote the following (995):

> "I don't feel under all the circumstances that the jury selected in this panel would be entirely unobjectionable. I don't mean by that that there is anything in the composition of it, so far as the individual men are concerned, that can be reasonably objected to; but, **however this thing happened, I don't like the looks of it.** I don't see any reason why the qualified jurors, people who are qualified to be jurors, resident in Cook County and Chicago, should be **systematically** left out of this box. I think that the jury commissioners, in putting the names in the box, ought to put in a fair proportion of qualified jurors from this county. I don't want to start in this trial feeling my-

self that something is not quite fair. **I don't want to start in the trial with the defendant and its counsel feeling there is something that is not quite fair about it.** I feel that we ought to start fair and keep fair. At least we ought to begin fair, and I think this panel ought to be set aside." (*Emphasis added.*)

We respectfully submit that the reasons given by Judge Anderson for quashing the panel in the *Standard Oil* case are most appropriate here in the case at bar. Your Honors will notice that Judge Wilkerson represented the Government in the *Standard Oil* case. It is fair to say that all judges and public officials in our District know that defendants feel that there is nothing fair about the manner in which Federal juries are picked. Now, to return to the cases cited by Mr. Ryan to the trial court.

Ruthenberg v. *United States*, 245 U. S. 480, 482.

In this case the defendants complained that the Sixth Amendment was violated because the jurors were not drawn from the entire district but only from one division thereof. If we were complaining in the case at bar that jurors were not drawn from the Western Division, this case would be in point. An examination of the cases cited shows further that the question decided is not the one in the case at bar. The Circuit Court of Appeals cites the *Ruthenberg* case (herein p. 82), thereby demonstrating a failure to grasp our point. The Appeals Court also cites the *Scadlund* case hereinafter noticed.

Lewis v. *United States*, 279 U. S. 63.

This case cites *Ruthenberg* v. *United States*, 245 U. S. 480, 482, and is similar in principle. Not in point here. The county where the offense had been committed had been transferred from one District to another and the defendant attacked the jurisdiction of the court. Held that the court had the same jurisdiction as before, and there was no error in drawing jurors from only part of the District.

That the Sixth Amendment did not require jurors from entire District.

We respectfully quote from that which Mr. Ryan said in the trial court (R. 5):

> "In the case of *Lewis* v. *United States,* the Court further passed upon the construction of this particular provision, and there it said the 6th Amendment does not require that the accused be tried by jurors drawn from the entire district.
>
> "It is submitted that the only requirement, your Honor, of the 6th Amendment, is that the jurors be not drawn from without the district, and there is no requirement that they be drawn from the whole district."

Your Honors will readily perceive that the prosecutor contended in the trial court for the right to select and hand-pick his jurors. The policy of the law, as we understand it, is that jurors should be drawn by lot (*People* v. *Lieber*, 357 Ill. 423). In *Pierre* v. *Louisiana,* 306 U. S. 354, the Supreme Court of the United States recognized the fact that exclusion of negroes could not have been by accident or result from an impartial drawing of jurors. The spirit of the law seems to be that jurors should be chosen by lot, fairly, in such manner that discrimination is not favored.

The *Lewis* case is one of the many authorities holding that unless the contrary appears it will be presumed that the jurors were drawn in compliance with the rule or order of Court. Such authorities, we respectfully submit, are not in point because in the case at bar the contrary does appear. In the case at bar the Government practically admitted our charge. Although we respectfully asked the trial court to investigate the matter, we respectfully submit that, after the argument made by Mr. Ryan on behalf of the Government, there was nothing left for investigation. The facts were evident and were not disputed. It must be significant to your honors that the Government attorneys objected to a waiver of the jury by your Petitioner. (R. 90.)

Needham v. *U. S.*, 73 F.[2] 1.

The point we make in the case at bar was not properly pleaded in the *Needham* case. An oral motion was made. A motion and affidavit was later filed, and the honorable Circuit Court of Appeals held that some parts of the motion were abandoned. In the *Needham* case the defendant did not exhaust his peremptory challenges, so it is fundamental that he was in no position to complain of the ruling below. This case, we respectfully submit, is easily distinguished from the case at bar.

Seadlund v. *U. S.*, 97 F.[2] 742, 747.

Mr. Ryan, representing the Government in the case at bar, stated (R. 7) to the trial court that Seadlund complained of too many jurors from Cook County. We mention this only to illustrate the power improperly placed in the hands of the Jury Commissioners. As an authority the *Seadlund* case, we respectfully submit, is easily distinguishable from the case at bar. The defendant in that case took the position that the law requires a jury from the entire District. Our respectful complaint in the case at bar was that the jury was hand-picked, with the object of convicting your petitioner. The disproportion was merely one of the facts which confirmed our charge. We respectfully submit that in the case at bar the prosecutor, Mr. Ryan, practically admitted our accusation that the jury was hand-picked. All we sought was a fair and impartial jury. The Statute referred to in the *Seadlund* case is not involved here.

Mr. Ryan told the trial court (R. 86) that we could have come in before trial and requested an order that the jury be drawn from a certain part of the District. No such order was requested or entered, and we do not understand that a defendant is required to move for a fair jury before trial. We respectfully submit that the burden or duty to

see that a defendant secures a fair jury is upon the prosecuting authorities, subject to the further duty of the court to also see that a defendant is not prejudiced. This burden placed upon the prosecutor is mentioned in *United States* v. *Price*, Fed. Cas. No. 16088.

United States v. *Price*, Fed. Cas. No. 16088.

In this case, cited by the Government in the trial court, the Marshal selected jurors from inland in a case involving shipping. It was charged by the defendants that no attempt was made in the trial court to comply with the State Statutes intended to insure a fair jury. The court below ruled with the United States, but if we understand, the court of review's disapproval is indicated. The demurrer admitted irregularity and the challenge should have been sustained.

An important principle is stated in the *Price* case, and that is, that the plaintiff should see that the jury is properly selected and should expect a challenge. The prosecutor, as your Honors know, occupies an official position which makes it his duty to see that a defendant secures a fair trial. He should seek no advantage, and when it is charged that juries are being hand-picked, we respectfully submit that the District Attorney should welcome an investigation and be the first to stop the abuses practiced. The great and powerful United States Government, we respectfully submit, does not need, and its agents should not seek, an advantage over any citizen.

United States v. *Murphy*, 224 Fed. 554.

The challenge to the array was sustained. The opinion points out that such action was proper for the reason that the United States Attorney furnished some of the names. Much that appears in the opinion was not necessary for the decision except as advisory. We have no quarrel with

the general principles stated. The court said in passing that there was no law requiring the panel to be apportioned in accordance with population. No attention was paid to that (p. 559). We respectfully submit that if the panel had been hand-picked and the disproportionate feature only one of the elements, a different question would have arisen, one more like the case at bar. We quote from the *Murphy* case (560):

> "Jury lists should, so far as possible, be free from suspicion or criticism."

The court quotes with approval from *Klemmer* v. *Mount Penn Gravity R. R. Co.*, 163 Pa. 521, 530, 30 Atl. 274, where it is said that if the wheel had been filled by selections made by political and personal friends of the board a motion to quash would be sustained.

> "We would do this, even though as to irregularities of less gravity appellant might be treated as having waived them. One of this character no consent or waiver of parties could cure."

Authorities Referred to by Petitioner on Jury Question.

By Sec. 411, Title 28 U. S. C. A. jurors in Federal Courts must respond to the same qualifications as are provided for the state courts. Sec. 415 provides for no discrimination because of race, and 413 authorizes the judge to order jurors from such parts of the District as will insure an impartial trial and not incur unnecessary expense or unduly burden the citizens of any one part of the District. No order was entered under section 413 in the case at bar, and no such order could be defended if it provided that the jury be selected with a view of favoring the prosecution. Mr. Ryan argued that your petitioner could have applied for an order under 413, but we respectfully submit that that is beside the point. We shall respectfully refer to a few of the cases wherein it was held to be proper to order the jury under Sec. 413.

In *Walker* v. *United States*, 93 F.^{2} 383, 391, the court ordered that prospective jurors from Kansas City be omitted because of the wide publicity given the case where the defendants resided, involving election frauds. This was done in order to secure an impartial jury, and it was held that the discretion of the court was not abused. Your Honors will notice that the Clerk testified that wage earners and laborers were on the list. It appears that a letter was sent out in order to aid the authorities in securing names. The letter is copied in the opinion and is construed not to be discriminatory. The Circuit Court of Appeals infers, we respectfully submit, that if the letter had been a step in discrimination, the panel would have been quashed. Please compare the method adopted in the case at bar (R. 58, 59) as to the letter. The jury commissioner has no authority to delegate his power or duty (*In Re Petition for Special Grand Jury*, 50 F.^{2} 973).

In *Jarl* v. *United States*, 19 F.^{2} 891, an order of the court directing that the jury be drawn from all counties but one, containing Omaha, was upheld. Again we respectfully submit that this was proper under the statute in an effort to obtain an impartial jury for the reasons suggested.

In *Frantz* v. *United States*, 62 F.^{2} 737, 739, the judge excused all on the panel from one county. A former trial had resulted in a disagreement and the judge was endeavoring to secure an impartial trial. No claim was made that the trial court's discretion was abused and no prejudice was apparent.

In *United States* v. *Miners Transportation Co.*, 187 Fed. 355, the court ordered a panel drawn, and in its order designated the number of jurors to be included from each county. The defendant complained that although one county had a large population jurors were not to be chosen in proportion thereto. The court points out reasons for

such action. Some districts do not contain as many qualified jurors in proportion to population as others. The order was intended to secure a fair jury. No such reason could be given in the case at bar, and we charge, without dispute, that the disproportionate selection was only one step in loading the panel.

In *Spencer* v. *United States,* 169 Fed. 562, the boundaries of the District were changed. The court ordered that jurors not be drawn from the county where the court sat. The purpose was to secure an impartial jury and there was no error.

In *Atwood* v. *State,* 96 Tex. Cr. Rep. 249, 257 S. W. 563, it appeared that qualified electors were intentionally left off the list, which was held erroneous and of such materiality as to require reversal.

In *Pollard* v. *State,* 148 Ga. 447, 96 S. E. 997, it was held error to draw the petit jurors from the grand jury box. One had a right to select the trial jury from an array or panel indifferently drawn from the whole body of citizens and not from a restricted number thereof.

As is shown by the record in the case at bar (R. 89), the following took place:

> "Mr. Stewart: And then the defendant has a written waiver of jury. What is your attitude on that?
>
> "Mr. Woll: I suggest, if your Honor please, if we could have a short recess—
>
> "The Court: You mean to discuss that matter?
>
> "Mr. Woll: As to that matter.
>
> "The Court: Well, of course, the Court must also agree and consent to the waiver, and your motion to eliminate the jury and have the Court hear it, that is what it is tantamount to, will be denied.
>
> "Mr. Stewart: Exception.
>
> "Mr. Woll: I might state for the record, if your Honor please, that we oppose the waiver of a jury trial."

The importance of calling your Honors' attention to this is to show your Honors that your petitioner did everything in his power to avoid a trial with an illegally selected and unfair jury. We respectfully submit that your petitioner had every right to fear a certain conviction, regardless of the evidence, at the hands of a jury so chosen.

In the cases of *West Chicago Street Railway Co.* v. *Annis*, 165 Ill. 475, 479, *Chicago C. R. Co.* v. *Creech*, 207 Ill. 400, and *Paul* v. *Garman* (Ill. App.), 34 N. E.[2] 884, 891, the court said that in considering error assigned as to argument claimed to be improper, the court will take into consideration, among other things, "the temper and character of the jury." This Honorable Court will be good enough to keep in mind the temper and character of the jury in the case at bar in determining the prejudice claimed to have been created by the prosecutor.

Your Honors will notice also, when it comes to consideration of our objections based upon the irregularity of the return of the verdicts, that the jury was polled (R. 427, 428). Mrs. Pohlman hesitated and shed tears, indicating, to us, her reluctance to convict the defendant upon the flimsy evidence submitted by the Government. Mrs. Pohlman was from the regular panel and was the only juror of the twelve who served who lived in Chicago (R. 93). We don't count Henry Tesch, as he lived on the outskirts.

In *Pierre* v. *Louisiana*, 306 U. S. 358, the court said that if the venire for petit jury should be quashed it necessarily followed that the indictment should have been quashed. Mr. Justice Black said (358):

> "Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races —otherwise qualified to serve as jurors in a community—are excluded as such from jury service."

The Fourteenth Amendment is not applicable in the case

at bar, nor is discrimination because of race or color involved, but we respectfully submit that the underlying principles are the same. As was said in *Strauder* v. *West Virginia*, 100 U. S. 303, 308:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."

The last named case also involves the negro question, but the court, in passing, holds that the discrimination would be just as unlawful if all white men were excluded or all naturalized Celtic Irishmen were omitted. In *Mamaux* v. *United States*, 264 F. 816, the defendant claimed that wage earners were excluded, but it was held to be of no avail because he failed to show the manner in which he was prejudiced. The defendant in the case at bar, as we have stated, pointed out the manner in which his case would not receive a fair trial at the hands of a hand-picked jury from the suburbs and outlying parts of the District, from which the every day wage earners had been excluded. See also *Smith* v. *Texas*, 311 U. S. 128; *Walker* v. *United States*, 93 F.^{2} 383, 391.

As your Honors have perceived, the challenge to the array was overruled by the trial court, and this adverse ruling has been duly assigned as error in the Circuit Court of Appeals (R. 446). The honorable Circuit Court of Appeals held that our respectful complaint did not merit serious consideration (herein p. 81).

This Honorable Court will perceive that it was the paramount and manifest duty of the judge and prosecution to see to it that your petitioner secured an impartial jury, and that there should not have been a suspicion of irregularity. Surely, your Honors will agree that the serious charge made by the petitioner, and not denied by the Government, that his jury was hand-picked and packed against him, can not be lightly brushed aside.

Your Honors will see that the only reason that there was no evidence was that the prosecutor succeeded in blocking the offer of your petitioner to produce evidence. We respectfully request your Honors to read the transcript (R. 80) for the facts, we quote:

> "Mr. Stewart: All we are asking the Court to do is to ascertain the facts, and if the facts are that these jurors are selected in such a manner that it is not by lot, why, that can be a grave danger to the liberty of any defendant.
>
> "If a jury commissioner or a marshal or a sheriff is permitted to go out and just pick jurors that he thinks he wants in that particular case, why, they can control the result.
>
> "So the motion here now is that your Honor follow up this charge that is made by examining into the question of the composition of this panel and the manner in which it is selected."

We respectfully submit that the manner in which the prosecutor successfully prevented the introduction of evidence and a full inquiry as sought by your petitioner is shown by the record, from which we quote further (R. 87):

> "Mr. Ryan: Your Honor, the Government takes the position that the challenge to the array made here shows on its face, together with the affidavit filed in connection with it, that it is not sufficient in law to entitle the defendant to quash the panel in this case.
>
> "The Court: Anything further, Mr. Stewart?
>
> "Mr. Stewart: No, your Honor.
>
> "The Court: Nothing further.

"All right, Mr. Clerk, motion to quash is overruled."

* * * * * *

"Mr. Stewart: I take it that your Honor is following the recommendation of the Government and refusing to go into the matter?

"The Court: That is right. I don't think it is my duty.

"Mr. Stewart: I take exception to the action of the Court and exception to the ruling."

So your Honors will perceive that the trial court followed the recommendation of the Government attorneys and refused to hear the evidence.

We respectfully submit that the honorable Circuit Court of Appeals inadvertently evaded the real question by a misconception of the record.

We respectfully quote from the opinion in the *Johnson* case (herein p. 100):

> "There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

This language is particularly applicable in the case at bar as to the manner in which petitioner's challenge to the grand jury and trial jury was evaded.

The same honorable Circuit Court of Appeals said in the *Johnson* case (herein p. 97):

> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to

answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas,* 177 U. S. 442, 447."

Further the honorable Circuit Court of Appeals said in the *Johnson* case that (herein p. 100):

> "Failure to have proved venue, no doubt, would have been fatal to the judgment. We think failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal. This is especially true in the instant case where the Government relied upon it in order to escape facing the issue tendered by the motion to quash.
>
> "The position of the Government leads to the inevitable result that a Grand Jury may, with impunity, exceed the limitation which Congress has definitely and plainly placed upon its authority, to act at a succeeding term. Furthermore, its unauthorized acts are not subject to challenge and the Government can never be called upon to make proof that the Grand Jury has proceeded in compliance with law. When confronted with a motion to quash or plea in abatement, it relies upon an allegation of the indictment. When the latter is placed in issue by the defendant's plea, it offers no proof in support of the allegation, and the only excuse for its failure to do so is that the court takes judicial notice. There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

The Government, as we have said, having petitioned your Honors in the *Johnson* case (Docket Nos. 799 and 800), the record in that case is now before your Honors. Your Honors will perceive that the record in the *Johnson* case

and the case at bar are practically identical as to certain errors held to be fatal in the *Johnson* case and held by the Circuit Court of Appeals not to exist in the case at bar.

Improper Cross-Examination of Petitioner.

The prosecutor took your petitioner back (R. 283) to 1898 and inquired where he lived each year and his business, how long he knew Mongoven and if Mongoven was not in the slot machine business (R. 283, 311-312). How much Doc Williams received in salary (R. 284), how long he knew Laird, Chief of the County Police (R. 285), and how often he saw him, and where (R. 311), when he started buying saddle horses (R. 286) and about a barn built in 1939 and 1940. What the business of the horse buyer was formerly. About showing horses. About the business Al Cohn was in (R. 288). How often the lawyers, Brodkin and Bieber, were at the junk yard, and if Brodkin and Bieber didn't represent the bookies in town who were arrested. How he allowed Marcus to take title to some property years ago, in 1935, without any profit to your petitioner, and if Marcus didn't make bail bond for bookies (R. 292). If Wells was not out apologizing to your petitioner for telling the Government the truth (R. 294). If it was not Captain Harrison's duty to enforce the law as to handbooks and how often your petitioner saw Captain Harrison. About the gambling in defendant's saloon in 1898 (R. 295). Why his saloon was closed by the Mayor in 1916 (R. 296, 297). About the purchase of a home in 1904 (R. 303) and the amount of the mortgages, and if there had been a foreclosure and if the receiver had put your petitioner out of the property, and if the Mills Novelty Company didn't obtain a judgment against your petitioner in 1910 for $200 (R. 304), and if your petitioner didn't do business with the Mills Novelty Company. If your petitioner purchased the Waukegan Post in 1939 for 90 or 100 thousand dollars (R. 313) and if your petitioner didn't buy the Bon Air

Country Club. It will be necessary, of course, to study the record to see that this cross-examination was prejudicial and improper. Your petitioner denied all of the charges made upon collateral issues, and no effort was made by the Government to rebut your petitioner's denial.

It is respectfully contended that the prosecutors overstepped legal bounds in cross-examination and introduced collateral and remote matters with the sole purpose of prejudicing your petitioner in the eyes of the jury.

Your Honors will see from the record that Blocker and Matteson, two revenue agents, investigated your petitioner, and a settlement was made in 1932. Also that in 1936 revenue agents called your petitioner in and questioned him about the source of money expended by him for farms. Your petitioner told the agents (R. 142) that the money spent was from his savings. Your petitioner made his position clear in his affidavit filed in support of his challenge to the array (R. 54). Your petitioner said that he feared that collateral issues would be dragged into the case and he would be improperly discredited as a witness. We respectfully submit that all of the fears expressed by your petitioner proved to be well founded, for when your petitioner took the stand as a witness in his own behalf the prosecutor launched a smear campaign under the guise of cross-examination. We shall point to a few examples shown by the record.

We respectfully quote from the record (R. 296):

"The Witness (your petitioner): I was in the saloon business then, but I might not have been. I didn't sell the saloon at Lake and Robey, I had to close it up. (This was in 1916.)

"Mr. Hurley (Assistant United States Attorney): Q. Why?

"Mr. Stewart: Object, your Honor.

"The Court: He may answer.

"Mr. Stewart: Your Honor, may I be heard just a moment?

"The Court: Yes.

"(Whereupon the following conversation was had outside the hearing of the Jury:)

"Mr. Stewart: That is the time when he (the defendant) had difficulty with the police, and they wouldn't allow him to run. That has nothing to do with this case here, showing another offense.

"The Court: Is that your objection?

"Mr. Stewart: Yes.

"Mr. Woll: We are just asking questions.

"The Court: Be sure to keep away from that.

"Mr. Woll: We are just asking the questions.

"The Court: I understand.

"Mr. Stewart: I am telling what the answer will be.

"Mr. Woll: We can't help what the witness answers.

"Mr. Stewart: Yes, you can.

"Mr. Woll: We can ask our questions.

"The Court: You may ask questions, but stay away from that.

"Mr. Woll: He is a witness for all purposes.

"The Court: I understand and you understand what the rule is. He may answer the question.

"(Whereupon the following proceedings were had in the hearing of the Jury:)

"(Your Petitioner:) A. Mayor Thompson took the license away.

"Mr. Stewart: I move to strike it, your Honor.

"The Court: It may stand."

We respectfully submit that this was improper cross-examination and prejudiced your petitioner in the eyes of the jury, and that the court erred in overruling the objections and in not allowing the motion to strike.

Mr. Hurley asked your petitioner if the Mills Novelty Company didn't obtain a judgment for $200 against your petitioner in 1910 (R. 304). After an objection was overruled, your petitioner said he knew of no such judgment.

Your Honors will remember that Clifford testified that it made no difference what your petitioner had prior to 1919,

at which time Raber said your petitioner was broke. If there ever was a judgment for $200, as stated in the question, the prosecutors didn't prove it, and we fail to see its materiality. Surely, any such judgment could easily have been collected in view of the real estate holdings of your petitioner. Your Honors know that if the judgment had existed it would have interfered with the real estate dealings conducted by your petitioner. Anyhow, it is obvious that it had no place in the case except when the prosecutor was trying to improperly link your petitioner with the slot machine business. It is common knowledge that the company referred to manufactures and sells slot machines.

This same anxiety on the part of the prosecutor crops up again, as appears from the cross-examination concerning Mongoven (R. 311), wherein Mr. Hurley insinuated that Mongoven had something to do with slot machines. We quote (R. 312):

> "Mr. Hurley: He (defendant) said that he (Mongoven) was in the slot machine business. I want to know what end of it. There are a lot of angles to the slot machine business.
>
> "Mr. Stewart: What is the difference?
>
> "Mr. Hurley: It makes a lot of difference. I want to find out what he knows about it. Here is a fellow out there every week end. I don't think we should be limited.
>
> "The Court: You have been given great freedom, Mr. Hurley."

Your Honors will notice that the court reminded the prosecutor that he had been given great freedom. It is our respectful contention that the record shows that the court permitted the District Attorney to violate all known rules, to the prejudice of your petitioner.

We respectfully submit that the rule "*res inter alios acta*" forbids the introduction of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute (22 Corpus Juris Secundum, sec. 602, p. 926).

When Mr. Hurley failed to get what he wanted from your petitioner about Mongoven, and Louis Witt was shown to have no information, Mr. Plunkett (Assistant District Attorney) supplied the prejudicial material by testifying in his closing argument, as follows (R. 371):

> "Mr. Plunkett: You know who Leo Mongoven is. Your petitioner himself told you he is in the slot machine racket up in Lake County, and according to your petitioner himself, they play golf together every Saturday. Golf and what else? He didn't tell you what else but Louis Witt told you what else. They not only played golf, they are playing double solitaire with a shoe box full of money and Skidmore saying we will take care of you."

Here again, we respectfully submit, the prosecutor distorted and misquoted the evidence. Your Honors can search the testimony of your petitioner in vain for any evidence that Mongoven was in the "slot machine racket." There is no such evidence, and if there were, it had no relevancy. Mongoven was not even a witness in the case.

Next we call attention to the cross-examination of your petitioner relative to a newspaper (R. 313). Your Honors will note that Mr. Hurley asked your petitioner if he did not spend money on a newspaper in 1939. After your petitioner said no, the prosecutor followed this with specific questions about the Waukegan Post and insinuated by questions that between 90 and 100 thousand dollars was expended by your petitioner in this manner. Your Honors see again that after the court expressed some doubt as to its competency and indicated a limit, the prosecutor went right ahead, in disregard of the court's ruling. There was no evidence offered or introduced about any newspaper, and it is fair to infer that the Government had no such evidence. The prosecutor was merely reminding some of the jurors that they may have read somewhere in the newspapers that your petitioner owned the Waukegan Post. When Mr. Plunkett told the jury in argument that the jury

knew who Mongoven was, we respectfully submit that Mr. Plunkett referred to newspaper accounts about Mongoven.

The question asked by the prosecutor about the horses (R. 286) was not idle curiosity. We respectfully submit that the Government attorney was endeavoring to prejudice your petitioner with the jury.

The record shows that Brodkin and Bieber are lawyers, and questions implying that they represented bookies (R. 290) show the purpose of the prosecutor. Although the court sustained our objection and your petitioner said he did not know if Brodkin and Bieber represented bookies, we respectfully submit that the harm was done. We respectfully submit that it is improper, on cross-examination, to attempt to discredit the witness by sneers and innuendo, or insinuation and imputation (70 Corpus Juris, WITNESSES, sec. 1012, p. 809).

Your petitioner purchased the Division Street property in 1923 (R. 291, 292, 293). It had nothing to do with this case. The prosecutor, by his questions, insinuated that Marcus signed bonds for bookmakers, culminating in this question (R. 293):

> "Mr. Hurley: Q. As a matter of fact Marcus is running that bond business for you, isn't that right?
> "Mr. Stewart: I object, your Honor.
> "The Court: He may answer. You may answer.
> "The Witness: A. No, I haven't a dollar's worth of interest in it."

The prosecution made no effort to prove by evidence that your petitioner owned the business conducted by Marcus or that any profit was derived therefrom. If it be a fact that Marcus signed bonds for bookmakers, such fact, we respectfully submit, was immaterial. The prosecutor contented himself with the insinuation made in the question.

We respectfully submit that it is not permissible under the guise of testing the credibility of a defendant to ques-

tion him on cross-examination about matters not touched on in the examination in chief, and the sole tendency of which is to prejudice the defendant in the eyes of the jury (70 Corpus Juris, sec. 824, p. 665).

This misconduct upon the part of the prosecutor, as we have respectfully noted, is comparable to the misconduct condemned in *Berger* v. *U. S.*, 295 U. S. 78. *Little* v. *United States*, 93 F.^{2} 401, 408; citing *Lennon* v. *United States*, 20 F.^{2} 490, 494, *Glover* v. *United States*, 147 Fed. 426, *Havener* v. *United States*, 15 F.^{2} 503, *Gideon* v. *United States*, 52 F.^{2} 427, *Hartzell* v. *United States*, 72 F.^{2} 569. "And when indulged in the government will not be heard to say that such cross-examination is not prejudicial error." *Salerno* v. *United States*, 61 F.^{2} 419, 424; *Allen* v. *United States*, 115 F. 3, 11; *Gideon* v. *United States*, 52 F.^{2} 427.

We respectfully quote from *Singer* v. *United States*, 58 F.^{2} 74, 77:

> "Innocent men may be indicted and convicted and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administration of the law."

We quote from the argument (R. 373):

> "Mr. Plunkett (Assistant United States Attorney): In considering whether he wilfully left this off his tax return you must consider the kind of man he is and the kind of income it was and I say to you in a few words when a man who would sit out in that junk yard and collect extortion money from gambling all over the City of Chicago and Cook County and by doing that break down the fibre of law in this county, disrupt and corrupt the police and law enforcement of Cook County, would such a man hesitate for one second to cheat his Government out of every nickel he could take from it. You know the answer. You know the answer to that. He wouldn't hesitate and he didn't hesitate."

The honorable Circuit Court of Appeals said (herein, p. 86):

> "Appellant further contends that the court erred in permitting him to be cross-examined relative to matters immaterial to the issue before the court. It is quite true that many of these questions might tend to reflect upon his character, at least by innuendo. We think that the answers sought are pertinent and are well within the realm of his previous admissions. By testifying he tendered his character and reputation as a direct issue, and the court is granted much latitude in this respect. We think its discretion was not abused."

With all due respect, we submit that the honorable Circuit Court of Appeals could not have given such short dismissal to our serious charge against the prosecution, if the honorable Circuit Court of Appeals had not overlooked the record (R. 296).

We respectfully submit that the record shows improper cross-examination which prejudiced your petitioner in the eyes of the jury; that the trial court erred in overruling the objections and in not allowing the motion to strike; and that the honorable Circuit Court of Appeals erred in not correcting the error.

If and when this petition is allowed, we expect to respectfully point out the error of the court in permitting the prosecutor to cross-examine the defendant concerning the Mills Novelty Company, about Mongoven, Brodkin & Bieber, Marcus and the Waukegan Post.

The honorable Circuit Court of Appeals said (herein, p. 87), concerning the cross-examination complained of:

> "Indeed, much of it related to other crimes not described in the indictment, which were State crimes over which the Federal court had no jurisdiction."

Surely, this Honorable Court will not agree that a defendant may be asked about suspected irrelevant State

crimes over which the Federal court has no jurisdiction, merely because the Federal court has no jurisdiction. We respectfully submit that the question of federal jurisdiction is not involved, and its mention only tends to confuse.

Improper Conduct of Prosecutor.

We respectfully submit that the prosecutor improperly prejudiced the rights of your petitioner by stating his personal belief as to the guilt of your petitioner in argument. All of the closing arguments are shown in the record (R. 358 to 410). We respectfully quote from that which we respectfully claim to constitute reversible error (332):

> "Mr. Woll (United States Attorney): I represent the Government, and as long as I represent the Government, there never will come a time when I have to hold my head in shame and tell you one thing, that I never believed myself. I believe in this case; I know this man is guilty from that evidence on the witness stand, I say this evidence has proved him guilty."

Then Mr. Plunkett (Assistant United States Attorney) threw in his opinion, as is shown by the following (R. 363):

> "Mr. Plunkett: The second computation was based on the statement he made on June 23, 1936, before the revenue agents. They said to him, Mr. Skidmore, how much were you worth in 1928? He replied, I think I was worth $300,000. All right, *I don't think he was.* The evidence doesn't show he was, and the Government doesn't contend that he was. We say he was not."

It was said in *Beck* v. *United States*, 33 F.^{2} 107, that a criminal trial is a serious effort to ascertain the truth in which studied efforts to arouse passion and prejudice constitute misconduct which cannot be countenanced (*Nations* v. *United States*, 32 F.^{2} 598). And in *Read* v. *United States*, 42 F.^{2} 636, it was said that the prosecuting attorney had a duty to assist in giving a fair trial to a de-

fendant. See also *Taliaferro* v. *United States*, 47 F.2 699, *Hale* v. *United States*, 25 F.2 430, and *Volkmor* v. *United States*, 13 F.2 594.

The honorable Circuit Court of Appeals dismisses our respectful contention with but one sentence (p. 9, herein, p. 87):

> "We have read the arguments of counsel, and we are convinced that they are not fairly subject to this criticism."

Then the honorable Circuit Court of Appeals says (herein, p. 87):

> "It is only fair to say that neither appellant nor his counsel raised any objection to the argument until long after the verdict was returned, when it was too late to reserve an exception."

Turning to the record (R. 411), your Honors will find the following:

> "Mr. Stewart: The prosecutor has no right to express his belief."

It is true, of course, that we did not object every time the prosecutor violated his oath and deliberately appealed to prejudice and passion. We still respectfully insist that the honorable Circuit Court of Appeals has overlooked the prejudicial effect of the conduct of the prosecutor throughout the trial (*People* v. *Bimbo*, 314 Ill. 449, 453). We respectfully submit that that which was said by the honorable Circuit Court of Appeals in the *Johnson* case is also applicable in the case at bar. We respectfully quote from the opinion in the *Johnson* case (herein, p. 109):

> "A person reading the record, without knowledge of the charge, could reasonably conclude that the defendants were tried on the latter offense" (gambling).

Confusion as to Verdicts.

It is our respectful contention that neither verdict should be permitted to stand. After the indictments were consolidated for trial, the case stood just as if there were but one indictment containing six counts (*Gozner* v. *United States*, 9 F.^{2} 603). So the first verdict returned was not proper, as it did not respond to the issues and did not dispose of the entire case (23 Corpus Juris Secundum, sec. 1388, p. 1067).

In *Allen* v. *State*, 52 Ala. 391, it was held that the court should have refused to take the verdict, which was a nullity. The jury should pass upon the entire indictment. This verdict found only part of the issue the jury were empaneled to try. It was said in *Commonwealth* v. *Parker*, 294 Pa. 144, 143 A. 904, 907:

> "In Pennsylvania, however, in the absence of a statute so providing, we do not permit jurors to render piecemeal verdicts; all their conclusions must be comprehended in a single verdict."

In *United States* v. *Watkins*, Fed. Cas. 16649, 28 Fed. Cas., pp. 419, 478 (3 Cranc. C. C. 441), it was held that if the jury bring in a verdict, not answering to the whole matter in issue, the court, without recording it, will inform the jury that they may retire again to reconsider their verdict. The recorded verdict not answering all of the issues was set aside.

In *United States* v. *Keen*, Fed. Cas. 15510, 1 McLean 429, it was held that where the jury have omitted to find on one of the counts, the court may permit such count to be discontinued but the verdict cannot be amended as to enter a not guilty on such count. So in the case at bar the verdict as to No. 32125 is defective as not being responsive to the issues.

We respectfully submit that when the judge sent the jury back, the jury had the power to reconsider the first count (No. 32125) (*Straw* v. *State*, 197 Ind. 606, 151 N. E. 695). And so when the jury returned the second time with

guilty as to 1936, 1937, and not guilty as to 1933, 1934 and 1935, the second verdict was silent as to 1938, so it was an acquittal as to 1938, or it too was defective as not being complete (*State* v. *Snipes*, 185 N. C. 743, 117 S. E. 500).

We respectfully submit that where a jury returns a verdict of not guilty the court has no authority to require the jury to bring in another verdict finding accused guilty (*Woodham* v. *State*, 178 So. 464, 28 Ala. App. 62).

Where the jury, on discovering a mistake in the verdict, are allowed to retire again, the recordation of the verdict in regard to which the mistake occurred is not conclusive (23 Corpus Juris, Secundum, CRIMINAL LAW, secs. 1413, 1415, pp. 1112, 1113). Where an insufficient verdict is legally declared and entered, it is binding on the court (23 Corpus Juris, Secundum, CRIMINAL LAW, sec. 1415, p. 1113).

In *Owens* v. *State*, 40 Ga. A. 508, 150 S. E. 455, the jury brought in a verdict finding the defendants guilty as to the first count and not guilty as to the second count. The court declined to accept the verdict and stated to the jury that it was repugnant. The court sent the jury back and they returned with a verdict of guilty as to both counts. Sentences were entered and the court endeavored to correct its own error by vacating the sentence as to the second count. We quote (456):

> "The error which brought about the situation is harmful, and there is no cure for it but the grant of a new trial."

In the Federal courts it is improper for the judge to ask the jury during their deliberations how they stand numerically on the question of conviction (23 Corpus Juris, Secundum, CRIMINAL LAW, sec. 1380, p. 1058, citing *Brasfield* v. *United States*, 272 U. S. 448; *Spaugh* v. *United States*, 77 F.^{2} 720; *Berger* v. *United States*, 62 F.^{2} 438; *Weiderman* v. *United States*, 10 F.^{2} 745).

Applying this principle, we respectfully submit that the trial court in the case at bar had no right to inquire

as to how the jury stood upon one count. As soon as that inquiry was made and the information was given in open court before the deliberations of the jury were completed, prejudice should be presumed according to the principle of the above cited cases. The jury should have been discharged. It is respectfully submitted that under the circumstances no verdict could be properly sustained.

The jury acquitted as to 1933 to 1935 inclusive. The circumstantial evidence case required the jury to believe that the defendant was without funds in 1919 and that the money expended by him came from subsequent income. By rejecting this theory and acquitting for these first years the jury, in order to have been consistent, should have acquitted for 1936, 1937 and 1938.

We respectfully submit that the honorable Circuit Court of Appeals has overlooked the effect of the order of consolidation. After the indictments were consolidated, there were not two indictments any more, just numerous counts in one indictment.

The honorable Circuit Court of Appeals said (herein p. 89):

> "Appellant contends that a return of the verdict in the first indictment discharged the function of the jury as to both cases and that the second verdict constituted a second jeopardy of appellant as to the other indictment. We think there is no merit in this contention."

It will be noted that the honorable Circuit Court of Appeals regards the indictments as separate. We respectfully refer your Honors to our brief (p. 169), with the respectful suggestion that the honorable Circuit Court of Appeals has failed to pass upon our entire contention.

If your Honors determine that the writ should issue, we expect to respectfully demonstrate further that the so-called trial of your petitioner was but a mockery of justice.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioner.